Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2000

DEAN DEBOER and LUANNE DEBOER,

Respondents,

v.

CITY OF BELLINGHAM, et al.,

Petitioner.

Petition for Writ of Certiorari
To the United States Court of Appeals for the Ninth Circuit

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August 3, 2000

QUESTIONS PRESENTED FOR REVIEW

1. Whether a commercial supply contract between a municipality and a private vendor gives rise to a property right subject to due process protections under the Fourteenth Amendment?

2. Whether an individual partner to a partnership has a property right in a commercial supply contract between a municipality and the partnership subject to due process protections under the Fourteenth Amendment?

3. Assuming a private vendor has a property right subject to due process protections under the Fourteenth Amendment in a commercial supply contract with a municipality, does a state court proceeding for a breach of contract claim provide adequate process?

PARTIES TO PROCEEDING

Defendants/Appellees/Petitioners

City Of Bellingham	Tim Douglas
Lynn Carpenter	Bruce Disend
Richard Little	Bruce Ayers
Louise Bjornson	Arne Hanna
Pat Rowe	Don Gischer
Gene Knutson	Bob Hall
Corinne Pennington	Carol Browder
Jane Doe Douglas	Timothy Carpenter
Jane Doe Disend	Jane Doe Little
Jane Doe Ayers	John Doe Bjornson
Jane Doe Hanna	Jane Doe Hall
John Doe Pennington	John Doe Browder

Plaintiffs/Appellants/Respondents

Dean DeBoer	Luanne DeBoer

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I. CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

DeBoer v. Pennington, et al, 206 F.3d 857 (9th Cir., March 17, 2000).

II. STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

Petitioners seek review of the panel decision dated March 17, 2000 issued by the United States Court of Appeals for the Ninth Circuit reversing the July 23, 1996 order granting summary judgment issued by the Honorable William L. Dwyer in *DeBoer v. City of Bellingham, et al.*, United States District Court for the Western District of Washington, Civil Action No. C95-1402D. A copy of the March 17, 2000 panel decision is attached as Appendix A-1. Petitioners subsequently petitioned for rehearing en banc.

By order dated May 9, 2000, the Ninth Circuit Court of Appeals denied the petition for rehearing. A copy of the May 9, 2000 order is attached at Appendix C-1. Pursuant to Title 28 U.S.C. § 1254(1), the Supreme Court has jurisdiction to review the March 17, 2000 panel decision of the Ninth Circuit Court of Appeals.

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. XIV, §1. (See Appendix D-1.)

Title 42 U.S.C. §1983 (See Appendix D-1.)

IV. STATEMENT OF THE CASE

This case arises out of the City of Bellingham's decision to terminate the Management Agreement it had with D&M Operating Company (hereinafter "D&M"), a Washington partnership, to manage the city-owned Bayview Cemetery. Plaintiff Dean DeBoer was a partner in D&M at the time the Management Agreement was executed. The City decided to terminate the Agreement after an independent audit of the cemetery records discovered that D&M had overbilled the City over $20,000 between 1989 and 1994 and after a separate internal audit discovered almost $3,000 in additional overbillings. When confronted with the audit results, Mr. DeBoer admitted the overbillings.

The City terminated the Management Agreement for cause on January 31, 1995. In accordance with its contractual rights, the City took physical possession of the cemetery premises and took possession of the cemetery records for purposes of an audit to be conducted by the Washington State

Auditor's Office. With the exception of cemetery records that were being audited, all of DeBoer's property and equipment located at the cemetery was returned to him by late February, 1995.

A. Background Facts.

In November 1993, the City of Bellingham and D&M executed a contract for management of the Bayview Cemetery, a city-owned cemetery, for the period of January 1, 1994 through December 31, 1998. The contract identified the City of Bellingham as "a first-class municipal corporation of the State of Washington" and D&M Operating Company as "a Washington State partnership." Plaintiff Dean DeBoer signed the contract on November 3, 1993, in his capacity as "responsible person" for the administration of the contract on behalf of D&M, and in his capacity as "partner."

Following are significant contract provisions:

1. Section I. Purposes, provides that the contract was for personal services that did not afford D&M any interest in the City's real property. "It is the intention of the parties that this Agreement is one for personal services and that the Manager shall have no right, title, or interest in any of the real property herein mentioned."

2. Section V. Audit, Accounting, and Records, provided that D&M was to keep records of all business done at

Bayview Cemetery in accordance with generally accepted accounting principles, to make the records available to the City for audit, and to maintain the records for at least three years following termination of the contract:

> A. Manager shall keep full accounting records of all business done at the Bayview Cemetery in accordance with generally accepted accounting principles.
>
> B. Financial records for audit purposes shall be made available to the City and any other governmental agency with jurisdiction, and shall be retained by the Manager for at least three (3) years following the termination or expiration of this Agreement.

3. Under Section VIII. Facilities and Equipment, paragraph E, upon termination of the contract D&M surrendered the facilities to the City. "On termination or expiration of this Agreement, Manager shall surrender the facilities to the City in good, clean, and well-kept condition, ordinary wear and tear excepted."

4. Under Section X. Termination, the City could terminate the contract for cause upon written notice to D&M specifying the cause. D&M would then have 15 days within which to eliminate the specified cause:

> 2. Should the City for any reason desire to terminate this Agreement for cause, the Director of Parks and Recreation shall

> forthwith provide written notice thereof to the Manager, specifying the cause. Upon receipt of written notice, the Manager shall have fifteen (15) days within which to eliminate the cause of termination.
>
> 3. At the end of such period, this Agreement shall be automatically terminated.

5. Under Section XI. Relationship of the Parties: Subcontracting, the parties agreed that D&M was an independent contractor and that for no purpose were D&M, its employees, or its subcontractors, employees of the City of Bellingham.

> A. This Agreement is for the performance of professional services. The parties intend that the Manager shall be an independent contractor in the performance of services rendered pursuant hereto.
>
> B. . . . Neither Manager, his subcontractor, nor any employees of the foregoing shall be deemed to be employees of the City for any purposes. . . .

From January 1, 1994 until January 31, 1995, D&M managed the Bayview Cemetery under the contract. In 1994, an independent audit of D&M's records identified irregularities in the amounts D&M charged the City. The City commissioned a certified public accountant to independently audit D&M's records for the period of January 1, 1989 through

June 30, 1994. That report revealed that D&M had overbilled the City in the amount of $21,151. On behalf of D&M, Mr. DeBoer admitted overbillings.

Thereafter, the City discovered DeBoer was also overbilling the City for grave markers provided by a separate business he also ran on the cemetery premises. An internal audit performed by the City's Finance Department confirmed 22 instances of overbilling totaling $2,906. Mr. DeBoer also admitted these overbillings. This admission of overbilling for grave markers was reported to the City Council.

On January 23, 1995, the Bellingham City Council decided to terminate the cemetery management contract with D&M because of the overbillings identified by the two audits. On January 26, 1995, the City's Finance Director contacted the Washington State Auditor's Office about the additional overbillings and requested a meeting to discuss what assistance the State Auditor's Office could provide.

On January 27, 1995, Ms. Carol Browder and Ms. Corine Pennington of the State Auditor's Office met with Ms. Carpenter, Mr. Ayers (who was the president of the Council), Mr. Little of the City Attorney's Office and two other members of the City's administrative staff. The purpose of the meeting was to discuss the scope of the State Auditor's work regarding the Bayview Cemetery records. On January 30,

1995, Ms. Carpenter wrote a letter to Ms. Browder at the State Auditor's Office formally requesting an audit to "rehabilitate" the cemetery records in order to account for missing public funds.

On January 31, 1995, pursuant to the City Council's January 23rd decision, the City terminated the contract, secured possession of the cemetery premises, and maintained possession of the cemetery records in order to prevent destruction or alteration of the records prior to audit. None of the individual Bellingham defendants were present at the cemetery when the termination was executed.

The termination was affected when Mr. Byron Elmendorf, the City's Parks and Recreation Director, hand delivered the termination letter to Mr. DeBoer. The termination letter was addressed to Dean DeBoer, D&M Operating Company, and provided that the Bayview Cemetery Management Agreement was being terminated for cause effective February 15, 1995. It further provided:

> In the meantime, you are directed to remove yourself from Cemetery premises immediately and to re-enter only with the specific permission of the Director of Parks and Recreation. You are directed to leave on the premises all records and property of whatever nature pertaining to Cascade Memorials and D&M Operating Company.

> Byron Elmendorf will make arrangements with you to inventory property and records in the Cemetery office at the earliest opportunity, so you will have an opportunity to remove personal items.

(emphasis in original). Upon receipt of the termination letter, the only items Mr. DeBoer asked to remove from the premises were some blank checks, which he was permitted to take.

Following the termination of the contract, the state auditors returned to the cemetery on February 1, 1995 in order to identify the records they needed to conduct the audit. The relevant records were then taken to the State Auditor's Office in Bellingham for review.

B. Procedural History.

On September 15, 1995, Mr. and Mrs. DeBoer filed this action in the United States District Court for the Western District of Washington, civil action no. C95-1402WD. The Complaint alleged three separate causes of action: (1) deprivation of property and liberty in violation of Fourteenth Amendment due process, (2) unreasonable search and seizure in violation of the Fourth Amendment, and (3) breach of contract under Washington law.

On May 31, 1996, the Honorable William L. Dwyer dismissed the plaintiffs' Fourteenth Amendment claim against defendants Pennington and Browder of the

Washington State Auditor's Office because they could not be held liable for terminating the Management Agreement. On July 23, 1996, Judge Dwyer dismissed the plaintiffs' remaining Fourteenth Amendment substantive and procedural due process claims because the Management Agreement did not create a property right in favor of the plaintiffs. A copy of the July 23, 1996 order is attached at Appendix B-1. On February 14, 1997, Judge Dwyer dismissed plaintiffs' Fourth Amendment claims against the individual Bellingham defendants on the basis of qualified immunity.

By stipulation, the plaintiffs and defendants agreed that the rationale of the February 14, 1997 Order was equally applicable to defendants Pennington and Browder. Thereafter, Judge Dwyer entered a final judgment pursuant to Federal Rule of Civil Procedure 54(b) dismissing the plaintiffs' claims against all of the individual defendants.

Thereafter, plaintiffs filed an appeal with the United States Court of Appeals for the Ninth Circuit, docket no. 97-35363. In a split panel decision, the Ninth Circuit reversed the grant of summary judgment and remanded the case for trial. Judge Canby dissented based upon his previous opinion in *San Bernardino Physicians' Services Medical Group v.*

County of San Bernardino, 825 F.2d 1404 (9th Cir. 1987). The Ninth Circuit subsequently denied rehearing en banc.

V. ARGUMENT IN SUPPORT OF WRIT

This petition raises fundamental constitutional questions regarding the relationship between municipalities and commercial enterprises that contract to provide goods and services. There are thousands of contracts entered into every year between private contractors and governmental entities, such as municipalities. To clarify the scope of potential constitutional implications arising out of these contracts, petitioners request review by this Court to determine whether there is a constitutionally protected property interest in public service contracts. If this Court determines that there is a property right, then the Court also needs to determine what due process safeguards need to be implemented.

Private entities enter into commercial contracts with municipalities that are negotiated at arms length. These contracts are no different than contracts entered into with a private customer. However, unlike private contracts, public contracts have been subjected to constitutional scrutiny when disagreements arise over the operation and/or performance of these contracts. In what would otherwise be a garden variety breach of contract claim, private contractors are seeking relief under 42 U.S.C. §1983, asserting constitutionally protected

property interests in the public contract. With the federalization of these contract disputes, municipalities are exposed to a panoply of potential fees, costs and damages that would otherwise not be available in a lawsuit for breach of contract under applicable state law.

Here, the Court of Appeals has determined that a suit for violation of a contract was appropriately brought under 42 U.S.C. §1983, even though such a decision both (1) directly conflicts with a previous decision by the same Court, and (2) conflicts with decisions of other circuits. This brings this case squarely within the considerations for granting a petition for certiorari under U.S. Sup.Ct. Rule 10(a).

Despite the near unanimous belief that constitutional law should not be expanded to include all private contracts, the state of the law on this issue offers little guidance to parties entering into public contracts. The Ninth Circuit has now issued two decisions that reach different results with similar facts. Without reversing its holding in *San Bernardino Physicians' Services Medical Group v. San Bernardino County*, 825 F.2d 1404 (9th Cir. 1987), the Ninth Circuit reached an opposite conclusion in this case, holding that a private contractor had a federally protected property interest in a contract with a municipality.

Other federal circuit courts have also struggled with this issue. For example, in *S&D Maintenance Co. v. Goldin*, 844 F.2d 962, 967 (2nd Cir. 1988), the Second Circuit expressly stated that it did not intend its analysis to expand the legal doctrine providing due process protection to property rights. Rather, the *S&D Maintenance* court sought to stay within the broad parameters set forth in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) and its progeny. Consequently, none of the circuit courts have provided a definitive analysis regarding when a public contract gives rise to a constitutionally protected property interest.

A. There is No Property Interest in a Public Supply Contract that would Support a Procedural Due Process Claim.

In order to maintain their procedural due process claim under the Fourteenth Amendment and 42 U.S.C. §1983, the plaintiffs must show that they have a property interest entitling them to due process, and that they were deprived of that interest without due process. *Knudson v. City of Ellensburg*, 832 F.2d 1142, 1145 (9th Cir. 1987). Property interests are not created by federal constitutional law, but "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...." *Roth*, 408 U.S. 564, 577. However, federal constitutional law

determines whether the interest constitutes a property right protected by the Fourteenth Amendment. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978). It is well established that not every stated entitlement rises to the level of a constitutionally protected property interest. *Knudson*, 832 F.2d at 1145.

In the present case, the Ninth Circuit determined that the plaintiffs had a constitutionally protected property interest in a supply contract with the City of Bellingham. Citing case law relating to employment contracts, the Ninth Circuit based its decision on the fact that the supply contract could be terminated for cause. This decision, which is in direct conflict with a prior Ninth Circuit decision, improperly expands the scope of federal law into a contractual relationship governed by state law.

B. The Ninth Circuit's Decision Conflicts with its Prior Decision in *San Bernardino Physicians' Services Medical Group v. San Bernardino County.*

In *San Bernardino Physicians' Services Medical Group v. San Bernardino County*, 825 F.2d 1404, 1407 (C.A.9 (Cal.) 1987), the Ninth Circuit determined that a supply contract between a governmental entity and a private business did not give rise to a constitutionally protected property interest. In *San Bernardino*, the court held that a physician group's

contract to provide medical services was, for the purposes of the Fourteenth Amendment, no different than a construction contract or a material supply contract, and, therefore, did not confer a constitutionally protected interest on the physician's group. *Id.* at 1410.

Significantly, the *San Bernardino* court noted that nearly all of the successful contract claims under 42 U.S.C. §1983 involved employment contracts. Although the *San Bernardino* court emphasized that employment contracts are not the only type of contract that might be entitled to due process protection, it held that "the farther the purely contractual claim is from an interest as central to the individual as employment, the more difficult it is to extend its constitutional protection without subsuming the entire state law of public contracts." *Id.* at 1409 – 1410.

In addressing the plaintiffs' due process claim, the Ninth Circuit in this case correctly determined that the status of the plaintiffs was that of a supplier and not an employee. Consistent with the holding in *San Bernardino*, the Ninth Circuit refused to extend to the plaintiff the constitutional protection afforded tenured employees. *DeBoer*, 206 F.3d at 869-870 (citing *San Bernardino,* 825 F.2d at 1409).

At that point in its analysis, the Ninth Circuit departed from the rationale of *San Bernardino* and ruled the plaintiffs

had a claim of entitlement in the supply contract because the agreement was terminable for cause. Relying on *Unger v. National Residents Matching Program*, 928 F.2d 1392 (3rd Cir. 1991), the majority identified two types of public contract rights that purportedly give rise to property interests protected by the Fourteenth Amendment. The first category identified arises where the contract confers a protected status, such as in the case of welfare benefits. The second category may arise where the contract itself contains a provision that the governmental entity can terminate the contract only for cause. *DeBoer*, 206 F.3d at 870 (citing *Unger*, 928 F. 2d at 1399). Because the supply contract between the City of Bellingham and the plaintiff could only be terminated for cause, the majority concluded that it necessarily fell into the second category of protected contracts.[1]

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[1] The majority also cites the discussion in *S&D Maintenance Co. v. Goldin*, 844 F.2d 962, 967 (2nd Cir. 1988) for the proposition that public contracts that contain "termination for cause" provisions are subject to due process protection. However, it should be noted the *S&D* court was careful to distinguish employment contracts from non-employment contracts: "The continuation right would not be a protected right, even if we were to analogize S&D's service contract to an employment contract." *S&D Maintenance,* 844 F.2d at 967. Furthermore, the *S&D* court went on to state that its analysis should not serve as a vehicle to expand the scope of due process protections afforded public contracts:

As noted by Judge Canby in partial dissent, the majority contravenes the facts and result in *San Bernardino*.[2] In *San Bernardino*, the group medical services contract contained a "termination for cause" provision. The County had initially terminated the contract pursuant to the cause provision. However, the termination notices were rescinded before trial. Consequently, the majority opinion in this case states that the *San Bernardino* court did not have to address the effect of the "cause" requirement.

However, careful review of *San Bernardino* evidences no indication that the "cause" requirement was reserved for another case. Rather, as stated by Judge Canby in dissent of the present matter, the "cause" requirement was inherent to

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> However the contours of a protectable property interest may be shaped in the future, this case affords no occasion for any extension of existing doctrine because S&D's contracts do not provide it with entitlements within the traditional understanding of Roth. [*Board of Regents v. Roth*, 408 U.S. 564 (1972).

844 F.2d at 967.

[2] Judge Canby authored the opinion in *San Bernardino* and undeniably has a first hand understanding of the issues that were presented and decided in that case.

the due process analysis undertaken by the *San Bernardino* court:

> The majority opinion asserts that *San Bernardino* did not have occasion to consider the effect of the "cause" requirement because the County had rescinded the termination notices before trial. But the plaintiffs there continued to assert a due process claim based on their contract. *San Bernardino* therefore still had to consider, and did consider, whether the contract (with its "cause" requirement for termination) was constitutionally protected property. In deciding it was not property, *San Bernardino* did not rely at all on the fact that termination had been rescinded; the rescission appears only in the recitation of the facts and played no part in our reasoning. *See San Bernardino*, 825 F. 2d at 1406.

Dissent, 206 F.3d at 872, n. 2.

Inasmuch as the medical services contract in *San Bernardino* and the supply contract at issue here are of the same nature and character, it follows that Fourteenth Amendment due process protections should not be extended to the plaintiffs in this case. Rather, to the extent the City is found to have breached the contract, the plaintiffs' remedy is found only under state law.

The majority's reliance on the holding in *Unger*, *supra,* is similarly misplaced. In its discussion of the classes of public contracts that potentially give rise to a

constitutionally protected property interest, the *Unger* court cited contracts that contain a provision that the contract is terminable only for cause. *Unger*, 928 F.2d at 1399. However, in its brief discussion of this category of public contract, the *Unger* court cited only cases involving employment contracts. *Id.* (citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538–39 (1985); *Arnett v. Kennedy*, 416 U.S. 134, 166–67 (1974)).

Judge Canby writes in his partial dissent here that the distinction between the employment and non-employment contract justifies different treatment under the due process analysis. With respect to employment contracts, the Ninth Circuit does not distinguish between contracts that contain a termination for cause provision and contracts for a fixed term. Rather, in both cases the employee has an expectation of continued employment (at least during the fixed term) that triggers the constitutional protection. *DeBoer*, 206 F.3d at 872. (citing *Perry v. Sinderman*, 408 U.S. 593, 601 (1972); *Stretten v. Wadsworth Veterans Hospital*, 537 F.2d 361, 367 (9th Cir. 1976); *Vanelli v. Reynolds School District No. 7*, 667 F.2d 773 (9th Cir. 1982)).

Judge Canby observes that applying this logic to non-employment contracts would require that non-employment contracts for a fixed term, in addition to those non-

employment contracts with a "cause" requirement, be given due process protection. *DeBoer*, 206 F.3d at 873. Such a result would be contrary to the principle that not all public contracts give rise to a constitutionally protected property interest. *Id.* Following this analysis to its logical conclusion renders the majority's distinction meaningless and potentially opens the federal court floodgates to breach of supply contract claims involving governmental entities.

The present case involves a dispute that arises out of a type of supply contract. Under the holding in *San Bernardino, supra*, a supply contract is not given the same protections as an employment contract. Therefore, the Ninth Circuit's decision in this case conflicts with prior law from the Ninth Circuit, which warrants review by this Court to resolve this issue of broad constitutional and public import.

C. The Ninth Circuit's Decision Conflicts with the Stated Policy to Avoid "Federalization" of State Public Contract Law.

Despite the fact that very few federal courts have addressed the specific issues raised in this appeal, there is near unanimity that federal courts should be cautious in expanding the due process protections to public contracts. "We must bear in mind that the Fourteenth Amendment was not intended to shift the whole of public law of the states into

the federal courts....[T]he Constitution must not be trivialized...." *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983). (contract dispute between employees and sheriff's office regarding accrued time off was not properly brought under §1983).

The assertion that a due process hearing is required before any "public agency can ever terminate or breach a contract" is unrealistic and contrary to common sense. *Boucvalt v. Board of Commissioners*, 798 F.2d 722, 729–30 (5th Cir. 1986). Moreover, cases are "legion" which hold that "a simple breach of contract by the State does not rise to the level of a constitutional deprivation." *Medical Laundry Service, Inc. v. Board of Trustees of the University of Alabama, Birmingham*, 840 F.2d 840, 843 (11th Cir. 1988), (C.J. Roney, *dissenting*), *citing Braden v. Texas A&M University System*, 636 F.2d 90, 93 (5th Cir. Unit A 1981); *Costello v. Town of Fairfield*, 811 F.2d 782, 784 (2nd Cir. 1987); *Boston Environmental Inspectors Ass'n v. City of Boston*, 794 F.2d 12, 13 (1st Cir. 1986); *Sudeikis v. Chicago Transit Authority*, 774 F.2d 766, 770 (7th Cir. 1985); *Jimenez v. Almodovar*, 650 F.2d 363, 370 (1st Cir. 1981).

The conflict within the circuits about the question of whether a contractual dispute between a service contractor and a state entity rises to a constitutional claim cannot be

overstated. Some circuits have adamantly found that such suits are properly brought under §1983. *See, e.g., Medical Laundry Service, Inc., supra*, 840 F.2d at 842 (court found that suit for state university's allegedly wrongful termination of a laundry contract was properly brought under §1983), *but see, dissent* by C.J. Roney. *See also, G&G Fire Sprinklers, Inc. v. Bradshaw*, 136 F.3d 587, 596 (9th Cir. 1998) (constitutional claim found in case of contractual dispute over amount owed on contract), *affirmed on remand*, 204 F.3d 941 (9th Cir. 2000), *but see dissent* by C.J. Kozinski, 136 F.3d at 602 ("The state here is engaged in a commercial activity where it holds no special sway over other parties....").

At other times, the circuits have found that such suits cannot be brought under §1983 because the breach of a service contract is not the same as a deprivation of a property interest. *Medical Laundry Service, Inc. v. Board of Trustees of the University of Alabama, Birmingham*, 906 F.2d 571, 573 (11th Cir. 1990); *S&D Maintenance Co. v. Goldin*, 844 F.2d 962, 967 (2nd Cir. 1988) (court found no constitutional property interest under §1983 where city prematurely terminated contract with parking-meter company: "we hesitate to extend the doctrine further to constitutionalize contractual interests that are not associated with any

cognizable status of the claimant beyond its temporary role as a government contractor"); *Trimec, Inc. v. Zale Corp.*, 1990 WL 103647 (N.D.Ill. 1990) (court found no constitutional property interest in license agreement with city).

Finally, other cases take a middle ground. For example, in *Mid-American Waste Systems, Inc. v. City of Gary, Indiana*, 49 F.3d 286, 290 (7th Cir. 1995) the court found that a contract dispute might create a property interest. The court went on, however, to find that litigation on the contract in state court was simply the more appropriate process than a constitutional claim under §1983. *Id.* at 291-92. Accordingly, the court dismissed the constitutional claim. *Id.* at 292, 293. *Also see, section D, below.*

The circuits are in clear contradiction to each other and are, in fact, contradicting their own decisions. This situation requires the guidance of this Court.

Moreover, the Ninth Circuit's decision on this appeal presents serious implications for the future operations of governmental entities like the City of Bellingham. Not unlike large, private enterprises, municipalities and other governmental agencies enter into commercial contracts with vendors to provide goods and services. These commercial contracts provide the taxpayers with improved efficiency and savings of resources since the governmental agencies are not

required to duplicate services that are readily available in the open market. However, under the current ruling, unlike large, commercial enterprises, municipalities would be confronted with the added expense of addressing disputes over the operation of these commercial contracts in federal court, with the increased exposure attendant with claims under 42 U.S.C. §1983, including potential liability for attorney's fees and punitive damages (for individual defendants).

Conversely, under the Ninth Circuit's decision, the private vendor has its rights and status elevated merely because it entered into an arms length agreement with a municipality. There is no justification for granting a vendor constitutional rights and remedies that go above and beyond the traditional remedies afforded in state court for a breach of contract claim.

Judge Kozinski sharply criticized the inequity of federalizing contract disputes in his dissent in *G&G Fire Sprinklers, Inc. v. Bradshaw*, 156 F.3d 893, 909–10 (9th Cir. 1998):

> In lieu of this common sense solution – which also complies with binding precedent – the majority invokes the full panoply of federal due process, including the requirement of a pre-deprivation or prompt (whatever that litigation-inviting term means) post-

> deprivation hearing, whenever the state wishes to withhold payments for what it believes is defective performance under the contract. While the opinion addresses only the prevailing wage term, its logic carries much farther: If the state discovers any other type of breach – for example, failure to complete the project on time or to comply with applicable safety codes – it must provide such a hearing as an added price for the standard remedy of withholding payment. This gravely burdens the state's most potent remedy for dealing with recalcitrant contractors and subcontractors. Why the state should be saddled with this yoke when it engages in the purely commercial activity of construction – a burden not suffered by private builders – is beyond me. *San Bernardino* clearly teaches that commercial contract rights must be vindicated in state court using state remedies. By ignoring this teaching the majority creates not just an intra-circuit and inter-circuit conflict but also a wholly unwarranted burden on the thousands of states, counties, cities and special use districts governed by our law. Government is too unwieldy already; there is no justification for adding this heavy layer of red tape. I respectfully dissent.

Judge Kozinski's concerns are equally applicable to the issues raised in this petition. In view of the significant constitutional and public policy issues raised in this appeal, petitioners respectfully request that this Court accept review of this petition for writ of certiorari.

D. The Ninth Circuit's Decision Will Require the Federal Courts to Hear Cases When an Adequate and More Appropriate Remedy Exists in a State Contract Claim.

The Ninth Circuit's ruling would require the federal courts to accept cases which could more appropriately be brought in state court, as state contract claims. This would introduce to the federal litigation system a multitude of essentially state-law cases where an adequate remedy can be found in state court.

As far back as *Brown v. Breinen, supra*, federal courts complained that a contract dispute could as easily be addressed by post-deprivation hearings under state law. 722 F.2d at 365. In *Brown*, this was yet another reason for the court to find that there was no constitutional deprivation that supported a §1983 suit. *Id.* at 365-66. In other cases, the courts have gone further, indicating that where there is an adequate remedy via a state-law contract suit, there is no justification for a federal suit, even where some arguable deprivation may be found. *See, i.e., Mid-American Waste Systems, supra*, 49 F.3d at 291.

In *Mid-American Waste Systems*, the City of Gary, Indiana, entered into a contract whereby the plaintiff would lease the Gary Landfill for an unspecified period of time. 49 F.3d at 288. A controversy sprung up when the City wished to

remove the plaintiff from its position, and the plaintiff insisted that its lease did not expire until the landfill was filled. *Id.* The City sent armed police to escort trucks both to the Landfill without paying the plaintiff and to block the plaintiff's own trucks from entering. *Id.*

The plaintiff sued, arguing that the actions of the police, if nothing else, brought the case beyond issues of contract dispute. *Id.* The Court of Appeals unanimously held that contract litigation, in state court, was the appropriate remedy and therefore dismissed the §1983 claim:

> The adequacy of litigation as a means to determine the meaning of a contract is a premise of our legal system. Mid-American's opportunity to litigate in the courts of Indiana . . therefore is all the process "due" for claims of breach of contract.

Id. at 291.[3] *See also, G&G Sprinklers, supra,* 136 F.3d at 603 (C.J. Kosinski, *dissenting*) ("run-of-the-mill contract disputes" with the state should be handled in state court).

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[3] An independent reason for the Court's decision was its observation that few facts were disputed in *Mid-American. Id.* at 290. Instead, the application of the contract to the facts was the real issue. Thus, the question was less one related to due process than "protest[ing] the substance of the City's action." *Id.* at 292.

If the City breached its contract with D&M, they already have a remedy in state contract law. As in *Mid-American*, the DeBoers' "opportunity to litigate" in the courts of Washington "is all the process 'due'" for their claims.

VI. CONCLUSION

The question of whether a service contract, which happens to have the State as a party, creates a cognizable property interest under §1983 is hotly contested between the circuits. The matter is, in fact, so controversial that at least two circuits have issued multiple conflicting decisions, "so far depart[ing] from the accepted and usual course of judicial proceedings . . . . as to call for an exercise of this Court's supervisory power."[4] The direction of the highest court is needed, or the lower courts will continue to struggle with the

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[4] The Eleventh Circuit issued conflicting decisions in the two versions of *Medical Laundry Service, Inc.*, 840 F.2d 840 and 906 F.2d 571. The Ninth Circuit issued conflicting decisions in *San Bernardino Physicians' Services Medical Group, supra,* and *DeBoer v. Pennington* (this case) Arguably, *G&G Fire Sprinklers, Inc. v. Bradshaw* is another Ninth Circuit case conflicting with *San Bernardino*. 136 F.3d 587, 596 (9th Cir. 1998), *affirmed on remand*, 204 F.3d 941 (9th Cir. 2000).

question of whether the State must be treated differently, to its disadvantage, in every public supply contract.

DATED this 4th day of August, 2000.

JOHNSON CHRISTIE
ANDREWS & SKINNER, P.S.

By
ROBERT L. CHRISTIE
Counsel of Record
Attorneys for Petitioner

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEAN DEBOER; LUANNE DEBOER,
Plaintiffs-counter-defendants-Appellants,

v.

CORRINE PENNINGTON; CAROL BROWDER; JANE DOE DOUGLAS; TIMOTHY CARPENTER; JANE DOE DISEND; JANE DOE LITTLE; JANE DOE AYERS; JOHN DOE BJORNSON; JANE DOE HANNA; JANE DOE GISCHER; JANE DOE KNUTSON; JANE DOE HALL; JOHN DOE PENNINGTON; JOHN DOE BROWDER; JANE DOE ROWE,
Defendants-Appellees,

and

CITY OF BELLINGHAM; TIM DOUGLAS; LYNN CARPENTER; BRUCE DISEND; RICHARD LITTLE; BRUCE AYERS; LOUISE BJORNSON; ARNE HANNA; PAT ROWE; DON GISCHER; GENE KNUTSON; BOB HALL,
Defendants-counter-claimants-Appellees.

No. 97-35363
D.C. No.
CV-95-01402-WLD
OPINION

Appeal from the United States District Court
for the Western District of Washington
William L. Dwyer, District Judge, Presiding

Argued and Submitted
July 8, 1998—Seattle, Washington

Filed March 17, 2000

Before: William C. Canby, Jr. and A. Wallace Tashima, Circuit Judges, and Robert M. Takasugi,* Senior District Judge.

Opinion by Judge Takasugi
Concurrence by Judge Tashima
Partial Concurrence and Partial Dissent by Judge Canby

SUMMARY

Individual Rights/Civil Rights

Reversing a judgment of the district court, the court of appeals held that public officials are not entitled to qualified immunity for entering government-owned premises and seizing records and property of an individual government contractor based on an agreement that required financial records to be made available for government audit.

In 1993, appellee City of Bellingham, Washington entered into a five-year agreement with D&M Operating Company, a partnership owned by appellant Dean DeBoer and his father. Under the agreement, D&M was to manage and maintain a city-owned cemetery in exchange for a fee and a portion of the proceeds from monument and memorial sales.

The agreement could be terminated for cause or convenience. If a party did not agree to a proposed termination for convenience within 60 days, it would be handled as a termination for cause, with written notice of the cause.

*The Honorable Robert M. Takasugi, Senior United States District Judge for the Central District of California, sitting by designation.

Beginning in January 1994, DeBoer maintained an office at the cemetery. Following two audits of the cemetery's books, the City concluded that DeBoer had been overbilling for various contracts and memorials sold to the City by Cascade Memorials, his separate business. The City notified DeBoer of its intent to terminate the agreement for convenience. DeBoer's attorney notified the City by letter that DeBoer intended to take the full 60 days to decide whether to terminate the agreement for convenience. The letter also stated that DeBoer had corrected the alleged violations of the agreement in a timely manner.

The City's finance director was unable to persuade appellees Corinne Pennington and Carol Browder of the Washington State Auditor's Office (State defendants), to exercise their subpoena power to perform an audit of D&M's records.

City officials met with officers of the City's police department and sought a criminal investigation. They also asked the police to obtain a search warrant to avoid destruction of records that might show fraud by D&M. Ayers told the police that some of the information was on computers, at least one of which belonged to DeBoer. The police were unable to obtain a search warrant.

On January 31, 1995, the City Council directed the police to deliver a termination letter drafted by the City Attorney to DeBoer. City employees accompanied by police delivered the letter, forced DeBoer to leave the premises under threat of arrest, and sealed the grounds. The business records of D&M and DeBoer's other business, De Boer's personal records, and various items of personal property were sealed on the premises. The following day, the records were removed for examination by appellees Corinne Pennington and Carol Browder of the Washington State Auditor's Office (State defendants).

DeBoer was not allowed to reclaim his personal property until late February; his records were not returned by the State Defendants until months later.

DeBoer and his wife sued the City, various City officials, and the State Defendants under 42 U.S.C. § 1983 for violations of the DeBoers' due process and Fourth Amendment rights. They alleged that at the time of the seizure of the property, D&M was a sole proprietorship owned by DeBoer.

The district court granted summary judgment for the Bellingham Defendants on the ground that they were entitled to qualified immunity. The parties stipulated to the dismissal of the DeBoers' Fourth Amendment claim against the State Defendants on the ground that if the court's ruling was correct, they were also entitled to qualified immunity. The DeBoers appealed.

[1] Qualified immunity is provided to a public official to protect the official from a civil action for damages, as long as the official's conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known.

[2] To determine whether individual defendants are entitled to qualified immunity, courts must identify the specific right they allegedly violated. Then, the court must determine whether that right was so clearly established as to alert a reasonable officer to its constitutional parameters. If the right was clearly established, the court must consider whether a reasonable official could have believed that the conduct was lawful.

[3] In identifying the contours of the right, courts must strike a balance between the interests in vindication of citizens' constitutional rights and public officials' effective performance of their duties. The DeBoers alleged that the agreement did not authorize the individual defendants to seize their business records, equipment, and other property. Those allegations identified the contours of the right allegedly violated.

[4] To be clearly established, the law must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is to say that in light of preexisting law, the unlawfulness must be apparent. However, when the conduct is so patently offensive of the right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous preexisting caselaw is not required to show that the law is clearly established. A constitutional right may be clearly established by common sense.

[5] It was clearly established at the time the DeBoers' property was confiscated and searched that governmental conduct that has as its purpose the intention to elicit a benefit for the government in its investigative or administrative capacities falls within the ambit of the Fourth Amendment.

[6] Under the inevitable discovery exception, evidence unlawfully obtained may be admitted at trial if the government demonstrates that the evidence would inevitably have been acquired through lawful means. However, the doctrine does not negate the unlawfulness of the seizure, and is therefore no bar to a § 1983 action. The question was not whether, due to inevitable discovery, the audit would have been admissible against DeBoer in a criminal proceeding; it was whether the confiscation of the DeBoers' property constituted a "seizure" under the Fourth Amendment, violating the DeBoers' civil rights.

[7] The Bellingham Defendants did not possess any legitimate ground for seizing the DeBoers' property. The agreement did not authorize the Bellingham Defendants to seize the DeBoers' property under threat of arrest for purposes of the audit. The conduct was so egregious that a constitutional violation would have been apparent to reasonable officials without any guidance from the courts. The DeBoers' right to be free from unreasonable seizure of their property was clearly established, and was not diminished by the agreement.

[8] Qualified immunity may shield officials who conduct an unreasonable seizure that violates an individual's rights if a reasonable official could have believed that the conduct was lawful. The inquiry is whether in light of the totality of the circumstances the defendants' actions were objectively reasonable.

[9] Reasonable officials in the Bellingham Defendants' position objectively could not have believed that their conduct was lawful. Reasonable officials would not have interpreted the agreement to authorize the Bellingham defendants to seize the property. They attempted to obtain the records by having the State Defendants subpoena them. When they refused, the Bellingham Defendants sought to procure the records by way of a warrant. Reasonable officials would not have pursued those actions if they believed they were entitled to take possession of D&M's records.

[10] Even if it were assumed that reasonable officials objectively could have believed that they had a right to enter City-owned premises and take possession of the records, reasonable officials objectively could not have believed that the agreement empowered them to deprive the DeBoers of their possessory rights to their personal records and equipment, and the records of Cascade Memorials. **[11]** The facts alleged by the Bellingham Defendants could not support a reasonable belief that their conduct was lawful. They were not entitled to qualified immunity.

[12] The Fourteenth Amendment protects individuals from deprivation of property interests by the government without procedural due process. Due process is violated when there exists: a constitutionally protected property interest; the government's deprivation of that interest; and a lack of due process.

[13] A contract with a state entity can give rise to a property right protected under the Fourteenth Amendment. **[14]**

DeBoer presented evidence that he was the sole proprietor of D&M. **[15]** D&M's relationship with the City was one of an independent contractor. **[15]** D&M contracted with the City to supply the personal services of its employees, and to provide equipment and supplies. The agreement did not confer on DeBoer the protected status rendered tenured employees.

[16] The agreement created a legitimate claim of entitlement protected by the Due Process Clause, assuming that DeBoer was the sole proprietor of D&M. **[17]** The Bellingham Defendants presented DeBoer no opportunity to correct or eliminate the cause stated for the termination and forced him to leave the premises. Accordingly, the trial court erred in granting summary judgment in favor of the Bellingham Defendants on DeBoer's due process claim.

Judge Tashima concurred separately to emphasize that the agreement created a constitutionally protected property interest.

Concurring in part and dissenting in part, Judge Canby wrote that the agreement created no property interest in DeBoer that protected him from a breach by the City.

COUNSEL

Kurt Denke, Seattle, Washington, for the plaintiffs-appellants.

Peter Berney, Assistant Attorney General, Olympia, Washington, for defendants-appellees Carol Browder and Corine Pennington.

Robert L. Christie, Johnson & Martens, Seattle, Washington, for the defendants-appellees.

OPINION

TAKASUGI, Senior District Judge:

In this appeal, we consider whether city and state officials are entitled to qualified immunity for entering city-owned premises and seizing the business and personal records and the personal property of an individual where the city and the individual had agreed that "[f]inancial records for audit purposes shall be made available to the [c]ity and any other governmental agency with jurisdiction," and whether the agreement between the city and the individual created a constitutionally protected property interest.

I.

In November 1993, the City of Bellingham, Washington (the "City") entered into a written agreement (the "Agreement") with D & M Operating Company ("D & M"), to manage the City-owned Bayview Cemetery ("Bayview"), from January 1, 1994, to December 31, 1998. The Agreement was signed on behalf of the City by the mayor, Tim Douglas ("Douglas"), and on behalf of D & M by Dean DeBoer ("DeBoer"). Under the Agreement's terms, D & M would sell graves and merchandise, maintain records, schedule funerals and to some extent, maintain Bayview's grounds. In return, the City would pay D & M a monthly fee and a portion of the proceeds of Bayview's monuments and memorials sales.

Article X of the Agreement provides that the Agreement could be terminated for cause or convenience,[1] and Article V

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[1] A. *Suspension and Termination for Cause*:

1. If, through any cause, the Manager fails to fulfill in a timely and proper manner its obligations under this Agreement; or if it violates any of the terms of this Agreement; or if it violates applicable laws, rules, regulations, or ordinances of any governmental body with jurisdiction; or if the work done by the Manager is

of the Agreement sets forth D & M's obligation to maintain Bayview's financial records.[2]

In addition to his involvement with D & M, DeBoer operated another business, Cascade Memorials, which sold grave markers to the City.

Beginning in January 1994, DeBoer maintained an office at Bayview and managed Bayview pursuant to the Agreement's terms. In the fall of 1994, the City commissioned an independent certified public accountant to audit Bayview's financial records for time periods both prior to Bayview's association

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unsatisfactory to the City's Director of Parks and Recreation, this Agreement may be terminated as provided herein.

2. Should the City for any reason desire to terminate this Agreement for cause, the Director of Parks and Recreation shall forthwith provide written notice thereof to the Manager, specifying the cause. Upon receipt of written notice, the Manager shall have fifteen (15) days within which to eliminate the cause of termination.

3. At the end of such period, this Agreement shall be automatically terminated.

B. *Termination for Convenience*: This Agreement may be terminated for the convenience of the parties by written request, made a part hereof and executed in the same manner as this Agreement. The party desiring termination shall request such termination of the other party in writing. If the other party does not agree to the proposed termination within sixty (60) days of receipt of the request, the matter shall be handled as a termination for cause as set forth above, following which there will be an equitable adjustment of any amounts owed by either party to the other.

[2] A. Manager shall keep full accounting records of all business done at the Bayview Cemetery in accordance with generally accepted accounting principles.

B. Financial records for audit purposes shall be made available to the City and any other governmental agency with jurisdiction, and shall be retained by the Manager for at least three (3) years following termination or expiration of this Agreement.

with D & M and after the Agreement was in effect. The accountant examined the financial records of Bayview from January 1, 1989 through June 30, 1994, and discovered that D & M had over- and under-billed the City on a number of contracts which resulted in the City's overpayment, in an amount totaling $21,151.00. Shortly thereafter, the City conducted an audit of the City's purchases from Cascade Memorials and discovered that the City had also overpaid Cascade Memorials, in the amount of $2,906.00. DeBoer, claiming that the billing errors were unintentional, returned the City's overpayments.

In a letter dated December 13, 1994, the City notified DeBoer of its intent to terminate the Agreement for convenience pursuant to Article X, Section B. The City further advised DeBoer that it was also exercising its right to terminate the Agreement for cause pursuant to Article X, Section A, and listed the reasons for termination. DeBoer's attorney notified the City in a letter dated December 28, 1994 that DeBoer intended to take the full sixty days provided in Article X, Section B of the Agreement to decide whether to terminate the Agreement for convenience. The letter also informed the City that, in accordance with Article X, Section A, DeBoer had eliminated or rectified each of his alleged violations of the Agreement charged within fifteen days of the City's notice.

Thereafter, on January 23, 1995, the City Council decided that it would send another letter terminating the Agreement and that Bayview's records should be secured in order to preserve the possibility of further audits. On January 27, 1995, the City's finance director, Lynn Carpenter ("Carpenter") met with Corinne Pennington and Carol Browder (collectively the "State Defendants") of the Washington State Auditor's Office, and requested that the State Defendants perform an audit of Bayview's financial records. The State Defendants refused to subpoena and audit Bayview's records, but indi-

cated to Carpenter that they may be able to "rehabilitate" Bayview's records once the Agreement was terminated.

On January 30, 1995, City Councilman Bruce Ayers ("Ayers"), Assistant City Attorney Dick Little ("Little") and Carpenter met with officers of the City's Police Department and expressed a desire for a criminal investigation into DeBoer's accounting for possible fraud. They also requested the police obtain a search warrant because the City planned to terminate the Agreement with D & M the following day and feared that records proving the alleged over-billings were intentional might be destroyed. Ayers informed the police that some of the information was contained on computers. He also informed the police that at least one computer belonged to DeBoer and was not the property of the City. The attempt to obtain a search warrant was unsuccessful.

On January 31, 1995, the City Council directed the City Attorney Bruce Disend ("Disend") and Little to prepare a termination letter addressed to DeBoer. The letter was drafted, and it stated that the City's position was that the Agreement was terminated for cause effective in fifteen days, on February 15, 1995, pursuant to Article X(A)(2) of the Agreement. The letter also stated that DeBoer was to leave Bayview immediately and to leave behind "all records and property of whatever nature pertaining to Cascade Memorials and D & M Operating Company." Several City employees accompanied by police officers delivered the termination letter to DeBoer at Bayview, forced DeBoer to leave the premises under threat of arrest and sealed the grounds. DeBoer removed blank checks from the Bayview office, but the business records of D & M and Cascade Memorials and DeBoer's personal records, and equipment including, a truck, tractor, backhoe, photocopy machine and other memorial manufacturing equipment were sealed on Bayview grounds. The State Defendants advised the City employees on-site of the records, including computer files and cabinets, necessary to conduct an audit.

The following day, the records were removed from the premises for an audit by the State Defendants.

In late February, DeBoer was allowed to return to reclaim his equipment. His records were returned by the State Defendants some months thereafter.

DeBoer and his spouse, Luanne DeBoer, (collectively the "DeBoers") filed suit against the City, seven City Council members,[3] Douglas, Disend, Little, Carpenter, the State Defendants and the spouses of these individual defendants, for violation of the DeBoers' due process and Fourth Amendment[4] rights under 42 U.S.C. § 1983 and against the City for breach of contract.

The DeBoers moved for partial summary judgment on their claims asserting deprivation of rights guaranteed by the Fourth Amendment. City employees Carpenter, Disend, Douglas, Little and the City Council members (collectively the "Bellingham Defendants") and the City filed a cross-motion for partial summary judgment as to the same claim. State Defendants moved for partial summary judgment as to the DeBoers' civil rights claims. The district court ruled that the State Defendants could not be held liable for the termination of the Agreement as no issue for trial existed as to their involvement in the termination, thereby granting partial summary judgment in favor of State Defendants on the DeBoers' due process claim. The district court, however, denied the cross-motions with respect to the DeBoers' Fourth Amendment claim.

The Bellingham Defendants and the City then moved for

[3]The seven City Council members named in the Complaint are Bruce Ayers, Louise Bjornson, Arne Hanna, Pat Rowe, Don Gischer, Gene Knutson and Bob Hall.

[4]The Fourth Amendment applies to the States by way of the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

partial summary judgment as to the DeBoers' § 1983 claim for violation of their due process rights and claim for breach of contract. The district court concluded that the Agreement did not afford a property right subject to due process protection, granted partial summary judgment on the DeBoers' due process claim, and denied the City's motion on the breach of contract claim.

Thereafter, the Bellingham Defendants moved for partial summary judgment on the DeBoers' § 1983 claim for violation of their Fourth Amendment rights asserting qualified immunity. The DeBoers brought a cross-motion. The district court granted summary judgment in favor of the Bellingham Defendants and denied the DeBoers' motion, ruling that the Bellingham Defendants were entitled to qualified immunity because reasonable officials could have believed that their actions were lawful. Because of this ruling, the DeBoers stipulated to, and the district court ordered, the dismissal of the DeBoers' Fourth Amendment claim against the State Defendants because the DeBoers conceded that the State Defendants would also be entitled to qualified immunity pursuant to the court's reasoning. The parties subsequently stipulated to granting final judgment in favor of all individual defendants. The district court found no just reason for delay and entered final judgment in favor of all individual defendants pursuant to Federal Rule of Civil Procedure 54(b). Thereafter, the DeBoers filed this appeal contending that the district court erred in its grant of summary judgment in favor of the Bellingham Defendants, dismissal of the State Defendants, and denial of the DeBoers' cross-motion for summary judgment on the issue of qualified immunity concerning the Bellingham Defendants. They assert that the Bellingham Defendants and the State Defendants are not entitled to qualified immunity, and the Agreement with the City created a constitutionally protected property interest subject to procedural due process. We reverse and remand.

II.

We have jurisdiction under 28 U.S.C. § 1291 to review the district court's grant of summary judgment in favor of the individual defendants, and the district court's denial of the DeBoers' cross-motion for summary judgment against the Bellingham Defendants on the issue of qualified immunity. *See McGregor v. Nat'l R.R. Passenger Corp.*, 187 F.3d 1113, 1114 (9th Cir. 1999). We review a trial court's grant or denial of summary judgment *de novo*, *see PCCE, Inc. v. United States*, 159 F.3d 425, 427 (9th Cir. 1998), using the same standard set forth in Federal Rule of Civil Procedure 56(c). *See Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1054 (9th Cir. 1997), *cert. denied*, 522 U.S. 1107 (1998). We view the evidence in the light most favorable to the nonmoving party to determine whether genuine issues of material fact exist and whether the trial court correctly applied the relevant substantive law. *See Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995)

A. Qualified Immunity

The DeBoers contend that the seizure of their equipment and business records was not founded upon any objectively reasonable view of the law and, therefore, the Bellingham Defendants and the State Defendants are not entitled to qualified immunity.

The Bellingham Defendants maintain that they enjoy qualified immunity because the Fourth Amendment's application to their conduct is unclear, and because the Bellingham Defendants reasonably relied on the City's right to review Bayview's financial records, as created by the Agreement.

The State Defendants claim that they did not participate in the seizure of the DeBoers' property, arrived at Bayview after the City employees had already delivered the January 31, 1995 termination letter to DeBoer, and removed those finan-

cial records given to them by the City the following day for an audit at the City's request. The district court, however, did not reach these contentions because the DeBoers conceded that the State Defendants would be entitled to qualified immunity if the district court had properly decided the issue with respect to the Bellingham Defendants. Therefore, the parties stipulated to, and the court ordered, the dismissal of the DeBoers' Fourth Amendment claim against the State Defendants.

We review the district court's grant of qualified immunity *de novo*. *See Blueford v. Prunty*, 108 F.3d 251, 253 (9th Cir. 1997).

[1] "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, [the official] should be made to hesitate . . . ." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). However, where the official acts in an area where "clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.' " *Id.* (citation omitted). Thus, qualified immunity is provided to a public official to protect the official from a civil action for damages, as long as the official's conduct does not violate clearly established federal statutory or constitutional "rights of which a reasonable person would have known." *Id.* at 818.

[2] To determine whether the individual defendants are entitled to qualified immunity, we must first identify "the specific right [they] allegedly violated." *Kelley v. Borg*, 60 F.3d 664, 666 (9th Cir.1995) (citing *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir.1991)). Then, we must determine "[w]hether that right was so 'clearly established' as to alert a reasonable officer to its constitutional parameters." *Id.* If the right is not clearly established, the individual defendants are entitled to qualified immunity. *See Thompson v. Souza*, 111 F.3d 694, 698 (9th Cir. 1997). If the right is clearly estab-

lished, we must consider whether a reasonable official could have believed that her conduct was lawful. *See Kelley*, 60 F.3d at 666; *see also Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994); *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996).

1. Specific Right Violated

In this case, the district court did not identify the specific right allegedly violated or indicate whether the right was clearly established at the time of the alleged violation. Instead, the court proceeded directly to the third inquiry: whether a reasonable official, under the circumstances, could have believed that her conduct was lawful. Because the question of "[w]hether an asserted federal right was clearly established at a particular time . . . presents a question of law," we can determine such in the first instance. *Elder v. Holloway*, 510 U.S. 510, 516 (1994); *see also Mendoza*, 27 F.3d at 1360.

[3] In identifying the contours of the right we must strike a balance "between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). The DeBoers claim that the Bellingham Defendants and State Defendants infringed their Fourth Amendment rights by unlawfully seizing their business records, equipment and other property. More specifically, the DeBoers allege that the Agreement with the City did not authorize the individual defendants to seize their business records, equipment and other property; it merely requires that financial records be "made available to the City and any other governmental agency with jurisdiction" for audit purposes. These allegations specifically identify the contours of the right allegedly violated. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

2. Clearly Established Law

[4] Having identified the right at issue, we must determine whether it was clearly established before January 31, 1995.

"To be clearly established, the law must be 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *Newell*, 79 F.3d at 117 (quoting *Anderson*, 483 U.S. at 640). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640 (citation omitted). However, "when 'the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts' that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Mendoza*, 27 F.3d at 1361 (quoting *Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir. 1993)); *see also Backlund v. Barnhart*, 778 F.2d 1386, 1390 (9th Cir. 1985) (recognizing that "[t]here may be cases of conduct so egregious" that a constitutional violation would be apparent to any reasonable person). Thus, a constitutional right may be clearly established by common sense as well as closely analogous pre-existing case law. *See Newell*, 79 F.3d at 117.

The Fourth Amendment provides, in pertinent part, that "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). "Absent such interference, no fourth amendment seizure will be found." *United States v. England*, 971 F.2d 419, 420 (9th Cir. 1992).

[5] The Bellingham Defendants argue that it was not clearly established that their confiscation of private business records on City-owned premises for the purpose of securing and preserving the records for an audit, to which they were entitled under the Agreement with D & M, constituted a "seizure" under the Fourth Amendment. This contention,

however, misstates the facts. First, the Bellingham Defendants confiscated more than just the business records of the DeBoers, they also seized their equipment and other property. Second, the DeBoers presented evidence that the Bellingham Defendants seized their business records, equipment and other property and subsequently performed an audit, at least in part, for a criminal investigatory purpose. Assistant City Attorney Little, testified at his deposition that part of the purpose behind the state audit was in fact to further the criminal investigation of DeBoer. He further admitted that it was his understanding that the City's intent was to investigate and see whether a crime had been committed. It is clearly established, and was at the time the DeBoers' property was confiscated and subsequently searched, that governmental conduct which "has as its purpose the intention to elicit a benefit for the government in either its investigative or administrative capacities" falls within the ambit of the Fourth Amendment. *United States v. Attson*, 900 F.2d 1427, 1431 (9th Cir. 1990); *see also New Jersey v. T.L.O.*, 469 U.S. 325, 334-35 (1985).

The Bellingham Defendants assert that even if their conduct was motivated in part by a criminal investigatory purpose, pursuant to the Agreement they had a right to audit the cemetery records. Thus, they argue that they would inevitably have conducted the audit. This argument, however, confuses two distinct theories: the "inevitable discovery" exception to the exclusionary rule, *see Nix v. Williams*, 467 U.S. 431, 440-48 (1984), and the rationale that when governmental conduct would have been the same regardless of the governmental actor's subjective state of mind, attempts to uncover the governmental actor's "true" intent serve no purpose. *See United States v. Bowhay*, 992 F.2d 229, 231 (9th Cir. 1993).

[6] Under the inevitable discovery exception, evidence unlawfully obtained may be admitted at trial if the government by a preponderance of the evidence can demonstrate that the evidence would inevitably have been acquired through lawful means. *See Nix*, 467 U.S. at 444. The doctrine, how-

ever, does not negate the unlawfulness of the seizure and, therefore, is no bar to a § 1983 action. *See Chatman v. Slagle*, 107 F.3d 380, 382 (6th Cir. 1997); *see also Heck v. Humphrey*, 512 U.S. 477, 487 n. 7 (1994) ("[A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction."). The question we face is not whether the audit, due to inevitable discovery, would be admissible against DeBoer in a criminal proceeding; instead, it is whether the confiscation of the DeBoers' personal property constituted a "seizure" under the Fourth Amendment, violating the DeBoers' civil rights. Accordingly, the inevitable discovery doctrine has no meaningful application here. *See Chatman*, 107 F.3d at 382.

The second theory encompassed in the Bellingham Defendants' argument is that the Agreement entitled them to audit the cemetery records irrespective of their purpose. *See Bowhay*, 992 F.2d at 231 (holding that inventory search was not invalidated because the officer viewed the search as both an investigative and an inventory search); *see also United States v. Lillard*, 929 F.2d 500, 502 (9th Cir. 1991) (holding that arrest was not pretextual where officer knew of defendant's suspected methamphetamine manufacturing but "would have stopped him anyway because of his speeding and careless driving"). In *Bowhay*, we concluded that because the governmental actor's "conduct would have been the same regardless" of his or her motive, "no purpose is served by attempting to tease out the officer's 'true' motivation." 992 F.2d at 231.

[7] The Bellingham Defendants aver that the *Bowhay* rationale applies with equal force to their conduct because they would nevertheless have performed the audit pursuant to the Agreement. This argument fails for the simple reason that the conduct at issue is not the audit but the seizure of the DeBoers' property. The fact that the Bellingham Defendants

may inevitably have performed the audit is no bar to the DeBoers' Fourth Amendment claim. *See Chatman*, 107 F.3d at 382. In both, *Bowhay* and *Lillard*, the challenged conduct was supported by legitimate grounds and, therefore, was constitutional despite the existence of additional illegitimate grounds.[5] The Bellingham Defendants, however, did not possess any legitimate ground for seizing the DeBoers' property. The audit rights do not provide a legitimate basis for the seizure. The Agreement clearly did not authorize the Bellingham Defendants to seize the DeBoers' business records, equipment or other property under threat of arrest for purposes of the audit. We find that the Bellingham Defendants' conduct was so egregious that a constitutional violation would have been apparent to reasonable officials without any guidance from the courts. *See Mendoza*, 27 F.3d at 1361. Therefore, regardless of whether the Bellingham Defendants seized the DeBoers' property for a criminal investigatory purpose or solely for the purpose of securing and preserving the audit, we conclude that the DeBoers' Fourth Amendment right to be free from unreasonable seizure of their business records, equipment and other property was clearly established, and that this right was not diminished by the Agreement.

3. Objective Reasonableness of Official Conduct

[8] Qualified immunity may shield officials who conduct an unreasonable search or seizure which violates an individual's rights if a reasonable person in the position of the official could have believed that her conduct was lawful. *See Mendoza*, 27 F.3d at 1362 ("qualified immunity is available

[5]In *Bowhay*, lawfulness of the defendant's arrest was not in issue, it was the subsequent inventory search at the police station that defendant sought to suppress. *See* 992 F.2d at 230. In *Lillard*, defendant's speeding and careless driving justified the stop, and the officers' recognition of the distinct odor emanating from defendant's van as being associated with the manufacture of methamphetamine, coupled with their suspicion that defendant was making the drug, supported the conclusion that there was probable cause to arrest defendant. *See* 929 F.2d at 502.

if a reasonable official could have believed the conduct at issue was lawful"); *see also Anderson*, 483 U.S. at 641; *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996) (qualified immunity is available where, "in light of clearly established principles governing the conduct in question, the official objectively could have believed that his conduct was lawful"); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993) (same). The inquiry is whether in light of the totality of the circumstances the defendants' actions were "objectively reasonable." *See Mendoza*, 27 F.3d at 1362.

The district court ruled that the Bellingham Defendants were entitled to qualified immunity because "reasonable officials in [the Bellingham Defendants'] position, concerned that records be preserved, objectively could have believed that the [C]ity had a right to enter the office on [C]ity property and take possession of records to which the [C]ity had a contractual right of access," regardless of whether this conduct was actually lawful. We disagree.

[9] Reasonable officials in the Bellingham Defendants' position could not objectively have believed that their conduct was lawful. Article V of the Agreement sets forth D & M's obligation to maintain accounting records and states that "[f]inancial records for audit purposes shall be made available to the City . . . ." The Bellingham Defendants assert that they interpreted this language to entitle City officials to take possession of Bayview's financial records for audit purposes. As discussed above, the Agreement in no way authorized the Bellingham Defendants to seize D & M's records or the DeBoers' other property. Reasonable officials would not have interpreted the contract to authorize such. Moreover, the Bellingham Defendants' current interpretation of the contract is inconsistent with their conduct at that time. The Bellingham Defendants attempted to obtain the records by having the State Auditor's Office subpoena them and perform an audit. When the State Auditor's Office refused to exercise its subpoena power, the Bellingham Defendants sought to procure

the records by way of a warrant. These actions are inconsistent with and unnecessary to the Bellingham Defendants' current interpretation of the Agreement. Reasonable officials would not have pursued those ends if they believed they were entitled to take possession of D & M's records.

[10] Additionally, even if we assume, as concluded by the district court, that reasonable officials, concerned that Bayview's records be preserved, objectively could have believed that they had a right to enter City-owned premises and pursuant to the Agreement take possession of Bayview's records, reasonable officials could not have objectively believed that the Agreement empowered them to deprive the DeBoers of their possessory rights to their personal records, equipment, and the financial records of Cascade Memorials. The January 31, 1995 termination letter directed DeBoer "to remove himself from the Cemetery premises *immediately* and . . . to leave on the premises all records and property of whatever nature pertaining to Cascade Memorials and D & M Operating Company." This directive was carried out under threat of arrest. The Agreement cannot objectively be interpreted to enable the Bellingham Defendants to deprive the DeBoers of any property pertaining to Cascade Memorials and D & M.

[11] Consequently, the facts alleged by the Bellingham Defendants cannot support a reasonable belief that their conduct was lawful. Accordingly, the Bellingham Defendants are not entitled to qualified immunity. *See Act Up!/Portland*, 988 F.2d at 873 (finding that if the facts alleged by defendant could not support a reasonable belief that his conduct was lawful, he is not entitled to qualified immunity). We, therefore, conclude that the district court erred in granting qualified immunity in favor of the Bellingham Defendants and denying the DeBoers' cross-motion on the issue.

The record before us is unclear as to the State Defendants' involvement in the events of January 31, 1995 or their knowledge of events prior thereto. Pursuant to the stipulation of the

parties that if the Bellingham Defendants are entitled to qualified immunity so too are the State Defendants without need of a formal summary judgment motion, the district court dismissed the DeBoers' claims against the State Defendants with prejudice. This court cannot, at this time, determine whether the actions of the State Defendants were objectively reasonable in light of the clearly established law. We therefore vacate the dismissal to permit the district court to address on remand the separate contentions of the State Defendants.

B. Due Process Claim

The DeBoers maintain that the district court erred in granting summary judgment in favor of the Bellingham Defendants on the DeBoers' Fourteenth Amendment claim because the Agreement created a constitutionally protected property interest subject to procedural due process.

[12] The Fourteenth Amendment protects individuals from deprivation of property interests by the government without procedural due process. Due process is violated where there exists: (1) a constitutionally protected property interest; (2) the government's deprivation of said interest; and (3) a lack of process. *See Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993).

1. Constitutionally Protected Property Interest

[13] In determining whether the DeBoers possessed a constitutionally protected property interest, we must examine what interest was held, and whether that interest is afforded federal due process protection. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70 (1972). "[A] contract with a state entity can give rise to a property right protected under the Fourteenth Amendment." *Unger v. National Residents Matching Program*, 928 F.2d 1392, 1397 (3d Cir. 1991) (citing *Perry v. Sindermann*, 408 U.S. 593, 599-601 (1972)). The Bellingham Defendants contend that because DeBoer is

not a party to the contract with the City, he cannot assert a due process claim.

[14] The contracting parties on the face of the Agreement are the City and D & M, "a Washington State partnership." DeBoer, however, presented evidence, giving rise to a triable issue of material fact, that although D & M had once been a partnership, with DeBoer and his father as the partners, as of 1988 he took over full ownership and was the sole proprietor of D & M. A partnership, as defined by Wash. Rev. Code § 25.05.005(6), is "an association of two or more persons to carry on as co-owners a business for profit . . . ." Because when reviewing a grant of summary judgment, we view the evidence in the light most favorable to the non-moving party, *see Warren*, 58 F.3d at 441, we accept, only for the purpose of this appeal, that DeBoer was the sole owner of D & M at the time the parties entered into the Agreement.[6] We, therefore, must reach the substance of DeBoer's due process claim.

While all public contracts bestow various legal rights on the contracting entity under state law, not all public contracts necessarily invoke the protection of the Due Process Clause. *See San Bernardino Physicians' Services Medical Group, Inc. v. County of San Bernardino*, 825 F.2d 1404, 1408-09 (9th Cir. 1987); *see also Reich v. Beharry*, 883 F.2d 239, 242 (3d Cir. 1989) ("[A]lthough state contract law can give rise to a property interest protectible by procedural due process, not every interest held by virtue of a contract implicates such process."); *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 416 (7th Cir. 1988); *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 965-67 (2d Cir. 1988) ("[W]e hesitate . . . to consti-

[6]Because a triable issue of material fact exists that DeBoer was the sole-owner of D & M at all times relevant to this action, we need not decide the issue of whether DeBoer, in his capacity as partner of D & M, could have asserted a due process claim on behalf of the partnership. Additionally, because it is not raised on appeal nor was it raised below, we do not reach whether Luanne DeBoer's due process claim differs in any way from that of Dean DeBoer.

tutionalize contractual interests that are not associated with any cognizable status of the claimant beyond its temporary role as a governmental contractor."). Thus, our problem, then, is "to distinguish between 'mere' contract rights and [constitutionally protected] property rights created by contract." *Yatvin*, 840 F.2d at 416.

In *Unger*, the Third Circuit identified two general types of public contract rights that give rise to property interests protected under the Due Process Clauses of the Fifth and Fourteenth Amendments. The "first type arises where the contract confers a protected status" due to extreme dependence, as is the case with welfare benefits or permanence, as is the case with tenure, " 'or sometimes both, as frequently occurs in the case of social security benefits.' " *Unger*, 928 F.2d at 1399 (quoting *S & D Maintenance*, 844 F.2d at 966). The second type arises where the contract itself contains a provision that the governmental entity can terminate the contract only for cause. *See id.* (citing *S & D Maintenance*, 844 F.2d at 967).

a. Contract Conferring Protected Status

In *San Bernardino*, we considered whether the contract between the county and the plaintiff, a corporation whose employees provided medical services to the county, constituted the first type of public contract described in *Unger* and conferred on the plaintiff the protected status afforded tenured employment. Although we found that the medical services the corporation contracted to supply the county depended on the personal services of its employees, the expectation of continued employment of its employees depended not on the corporation's contract with the county, but on the corporate employees' contract with their employer, the corporation. *See San Bernardino*, 825 F.2d at 1409. The plaintiff corporation's relationship with the county, however, was that of a supplier, not an employee. *See id.* Accordingly, we refused to extend to the plaintiff the constitutional protection afforded tenured employees. *See id.* at 1409-10.

[15] The Bellingham Defendants contend that DeBoer's due process claim fails because the City's contract with D & M is a supply contract similar to the one in *San Bernardino*. Pursuant to the specific terms of the Agreement, D & M's relationship with the City was one of an independent contractor, not an employee. Article XI of the Agreement unequivocally states, "The parties intend that the Manager [(D & M)] shall be an independent contractor in the performance of the services rendered" to the City, and, "[n]either Manager, his subcontractor, nor any employees of the foregoing shall be deemed to be employees of the City for any purpose."

While an independent contractor who contracts with a public agency to provide her personal services may possess a property interest protected by the Fourteenth Amendment, *see San Bernardino*, 825 F.2d at 1409 n.5 (citing *Farr v. Chesney*, 437 F. Supp. 521 (E.D. Pa. 1977)), the Agreement between the City and D & M did not call for the personal services of DeBoer. Although DeBoer is listed as the party responsible for D & M, nothing in the Agreement suggests that the personal services of DeBoer or any other individual were essential to its performance. In fact, the Agreement explicitly contemplates that D & M ensure "adequate personnel" are on duty to serve the public and maintain Bayview's "buildings and facilities in a clean, well-kept and orderly condition . . . ." *See* Agreement, Article VII, Section B. Moreover, under the Agreement, D & M is required to provide such personnel as well as equipment and supplies for the efficient and satisfactory operation of the cemetery. *See* Agreement, Article VIII, Sections A and F.

[16] D & M, like the corporation in *San Bernardino*, contracted with the City to supply the personal services of its employees. *See id.* at 1409. It also agreed to provide equipment and supplies. Hence, the Agreement between the City and D & M is a supply contract, not an employment contract to provide the personal services of DeBoer. Accordingly, it

does not confer upon DeBoer the protected status rendered tenured employees.

b. Contract Terminable Only for Cause

In addition to contracts conferring protected status, *Unger* and *S & D Maintenance* recognized a second type of contract that gives rise to a due process protected property interest; to wit: a public contract terminable only for cause. *See Unger*, 928 F.2d at 1399; *S & D Maintenance*, 844 F.2d 967. Although the public contract in *San Bernardino* was terminable only for cause, the Board of Supervisors for the county decided to rescind the termination notices prior to plaintiff corporation's institution of the action. *See id.* at 1406-09. Therefore, the court did not, nor did it have occasion to, consider the procedural due process question in the context of a termination without cause where the contract specifically contained a provision that the contract could only be terminated for cause. *See id.* at 1406-09. Here, however, the City terminated the Agreement. Therefore, we must determine whether the Agreement was one which could be terminated only for cause.

[17] The Bellingham Defendants contend that Article X, Section B of the Agreement provides that the "Agreement may be terminated for the convenience of the parties by written request . . . ." Article X, Section B, however, goes on to provide in no uncertain terms that "[i]f the other party does not agree to the proposed termination within sixty (60) days of the receipt of the request, the matter shall be handled as a termination for cause as set forth above." Section B then refers to Article X, Section A, which states, in pertinent part, that "[s]hould the City for any reason desire to terminate this Agreement for cause, the Director of Parks and Recreation shall forthwith provide written notice thereof to the Manager, specifying the cause." Accordingly, under the terms of the Agreement, one party could not unilaterally terminate the Agreement for convenience; it had to do so for cause. The

Agreement between the City and D & M, therefore, creates a legitimate claim of entitlement in DeBoer protected by the Due Process Clause of the Fourteenth Amendment, assuming of course that DeBoer is the sole-proprietor of D & M. *See Unger* 928 F.2d at 1399; *see also S & D Maintenance*, 844 F.2d at 967-68.

2. Deprivation and Lack of Process

[18] We must next determine whether DeBoer was deprived of his constitutionally protected property interest in violation of his due process rights. As required by the Agreement, the City sent DeBoer a letter dated December 13, 1994, notifying DeBoer of its intent to terminate the Agreement for convenience pursuant to Article X, Section B, and for cause pursuant to Article X, Section A. By letter dated December 28, 1994, an attorney representing DeBoer, responded to the City's letter. The response indicated that DeBoer wished to exercise his right to take the full sixty days to decide whether to terminate for convenience; moreover, the response separately addressed each ground for termination for cause cited by the City and explained that each had been eliminated. Thereafter, the City served DeBoer with the January 31, 1995 termination letter which instructed him to immediately leave the premises without property or records and that the Agreement was terminated effective in fifteen days. The Bellingham Defendants, therefore, presented DeBoer no opportunity to correct or eliminate the cause stated for the termination and forced him to leave the premises. Accordingly, we find the trial court erred in granting summary judgment in favor of the Bellingham Defendants on DeBoer's due process claim.

C. Conclusion

The district court's grant of summary judgment in favor of the Bellingham Defendants on their defense of qualified immunity to the DeBoers' Fourth Amendment claim and the district court's denial of partial summary judgment on the

DeBoers' cross-motion on the qualified immunity defense are reversed and remanded. Upon remand, the district court is directed to enter partial summary judgment in favor of the DeBoers on the Bellingham Defendants' qualified immunity defense to the Fourth Amendment claim.

The district court's grant of summary judgment in favor of the Bellingham Defendants on the DeBoers' due process claim is reversed and remanded for further proceedings consistent with this opinion.

The order approving the stipulation dismissing the DeBoers' Fourth Amendment claim against the State Defendants is vacated and remanded for further proceedings consistent with this opinion.

TASHIMA, Circuit Judge, concurring:

I concur fully in Parts I, II.A, II.B.2, and II.C of the majority opinion. I also concur in the result reached in Part II.B.1, but I reach that result by a differently-reasoned route.[1]

As the majority opinion points out, by the time the events giving rise to DeBoer's termination occurred, D & M Operating Company had been transformed from a two-person partnership to a sole proprietorship.[2] *See* slip op. at 3148. The City's termination letter of January 31, 1995, recognizes DeBoer as "the principal" of D & M. Article I of the Agreement provides that "this Agreement is one for *personal*

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[1]As I set out below, I disagree with both the analysis and result reached in Part II.B.1.a, and do not reach the issue resolved in Part II.B.1.b.

[2]Since this case comes to us on appeal from the grant of summary judgment in favor of the City, I view the evidence in the light most favorable to DeBoer and draw all reasonable inferences in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

services." (Emphasis added.) Apparently the City (whose attorney drafted the Agreement) thought this point of sufficient importance that Article XI.A reiterates that "[t]his agreement is for the performance of professional services." Article XI.B goes on to provide that "[n]one of the services covered by this Agreement shall be subcontracted by the Manager without prior written consent of the City . . . ." Upon the City's insistence in late 1994, DeBoer withdrew from his other business ventures to devote his full time to the management of the cemetery. All indicia are that this was a five-year, personal service contract, terminable only for cause.

This is precisely the question we left open in *San Bernardino Physicians' Serv. Med. Group, Inc. v. County of San Bernardino*, 825 F.2d 1404, 1409 (9th Cir. 1987) ("[W]e do not suggest that employment contracts are the only kind that may be entitled to Fourteenth Amendment protection."). We further noted that "Physicians' Group's contract to supply the services of others is to be distinguished from an individual's contract to supply his or her own services." *Id.* at 1409 n.5 (citing *Farr v. Chesney*, 437 F. Supp. 521 (D.C.Pa. 1977)).

Viewing the evidence in the light most favorable to DeBoer, this Agreement was an agreement for DeBoer to supply his own personal services to the City. I would thus hold, on summary judgment, that DeBoer has raised a material issue of fact whether the Agreement can be construed as an agreement by the City to employ DeBoer to supply his own personal services, for a term certain, which could be terminated only for cause. If so, in Judge Canby's words, the Agreement would easily fall within "that large body of precedent holding that an employment contract under which a state employee may be discharged only for 'cause' creates a constitutionally protected property interest." Slip op. at 3155 (Canby, J., concurring and dissenting) (citing *Perry v. Sinderman*, 408 U.S. 593, 601 (1972)).

For the above reasons, I agree with Judge Takasugi's conclusion that "[t]he Agreement between the City and D&M,

therefore, creates a legitimate claim of entitlement in DeBoer protected by the Due Process Clause of the Fourteenth Amendment . . . ."

CANBY, Circuit Judge, concurring in part and dissenting in part:

I concur fully in that part of Judge Takasugi's opinion which holds that the Bellingham defendants are not entitled to qualified immunity with regard to DeBoer's Fourth Amendment claims.[1]

My disagreement with the majority is over DeBoer's due process claim. In my view, the contract between the City and D & M Operating Company, of which DeBoer was a partner, created no due-process-protected property interest in DeBoer that protects him against a breach by the City. As the majority opinion indicates, the City's contract was not a contract of employment, nor was it even a contract for DeBoer's personal services as an independent contractor. It therefore does not fall within that large body of precedent holding that an employment contract under which a state employee may be discharged only for "cause" creates a constitutionally protected property interest. *See Perry v. Sinderman*, 408 U.S. 593, 601 (1972).

The majority, however, concludes that DeBoer's interest is protected because the contract between his firm and the City could be terminated unilaterally by the City only for "cause." In so holding, I believe that the majority contravenes *San Ber-*

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[1]I also agree that the judgment granting qualified immunity to the state defendants, which was entered on the strength of the ruling in favor of the Bellingham defendants, must be reversed. The district court may then address the degree, if any, to which the actions of the state defendants differed materially from the actions of the Bellingham defendants.

nardino Physicians Serv. Med. Gp. v. County of San Bernardino, 825 F.2d 1404 (9th Cir. 1987). There we held that a corporation's contract to provide medical services to the County, terminable only for "cause," did not create a constitutionally protectible interest because the corporation stood "in the position of supplier, not employee." *Id.* at 1409. We declined to extend due process protection to such contracts because "[i]t is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a state into a federal claim."[2] *Id.* at 1408.

The same considerations control here.[3] The D & M partnership contracted to supply services to the City, and the contract was terminable by the City for "cause," with D & M to be given an opportunity to correct the cause-creating defect. The City terminated without following these provisions, and thereby breached its contract.[4] D & M has a remedy for that breach under state law.[5]

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[2]The majority opinion asserts that *San Bernardino* did not have occasion to consider the effect of the "cause" requirement because the County had rescinded the termination notices before trial. But the plaintiffs there continued to assert a due process claim based on their contract. *San Bernardino* therefore still had to consider, and did consider, whether the contract (with its "cause" requirement for termination) was constitutionally-protected property. In deciding it was not property, *San Bernardino* did not rely at all on the fact that termination had been rescinded; the rescission appears only in the recitation of facts and played no part in our reasoning. *See San Bernardino*, 825 F.2d at 1406.

[3]We are not confronted with a situation where some other governmental agency confiscated D & M's contractual rights which the City was still prepared to honor. Such a scenario would raise entirely different constitutional considerations from those presented by the City's breach as a contracting party.

[4]Because we are reviewing a summary judgment for the defendants, I accept DeBoer's version of the facts for purposes of appeal.

[5]*O'Hare Truck Service, Inc. v. City of Northlake*, 116 S.Ct. 2353 (1996), does not aid DeBoer. There the Supreme Court held that a towing company could not be removed from the City's referral list (which was governed by a "cause" requirement for removal) because of its political activity or inactivity. The Court refused to differentiate First Amendment rights of employees from those of independent contractors. *See id.* at 2359. First Amendment rights, however, ordinarily do not depend on contractual status, while contractual property rights necessarily do. *O'Hare* does not control this case.

The majority relies upon a dictum in *Unger v. National Residents Matching Program*, 928 F.2d 1392 (3d Cir. 1991), that property interests are created by contract in two classes of cases: (1) where the contract confers a protected status, either of extreme dependency such as welfare benefits, or of tenure for employees; and (2) where the contract includes a provision that it is terminable only for cause. *See id.* at 1399. With all respect, I do not believe that the second category extends to the ordinary business contract. The only holdings *Unger* cites for its second category are employment cases. *See id.* (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985); *Arnett v. Kennedy*, 416 U.S. 134, 166-67 (1974)). *Unger* also catalogs numbers of decisions, including *San Bernardino*, that support the proposition that all state breach-of-contract cases ought not to be turned into constitutional cases. *See Unger*, 928 F.2d at 1397-99.

There is a very important reason why the presence of a clause providing termination for "cause" should not convert rights under a business contract into property protected by the due process clause. In the employment cases, a contractual provision that employment may be terminated only for "cause" merely establishes the entitlement to an expectation of continued employment, which triggers the constitutional protection. *See Perry*, 408 U.S. at 601. By this logic, a contract of employment for a fixed term is also entitled to due process protection, because it provides for no termination at all during the specified term. Indeed, we have so held. *See Stretten v. Wadsworth Veterans Hospital*, 537 F.2d 361, 367 (9th Cir. 1976); *see also Vanelli v. Reynolds School Dist. No. 7*, 667 F.2d 773, 777 (9th Cir. 1982).

By the same reasoning, if we are to afford due process protection to state business contracts because they contain a provision for termination only for "cause," then we must extend due process protection to state business contracts that extend for a fixed term whether or not they contain "cause" provisions. Certainly the state should occupy no stronger position

when it contracts for ten years with no right to terminate for cause, than it would if it had contracted for ten years and provided that it could terminate the contract for cause. Thus, a huge portion of ordinary commercial breach of contract cases will be converted into due process constitutional cases when the state is the breaching party. Rather than run the risk of "convert[ing] every breach of contract claim against a state into a federal claim," *San Bernardino*, 825 F.2d at 1408, I would exclude these commercial contracts from the category of due-process-protected property, despite the presence of a "cause" termination clause or a fixed term.

In all other respects, I agree with the majority opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEAN DEBOER and LUANNE DEBOER, Plaintiffs, v. CITY OF BELLINGHAM; et al., Defendants.	NO. C95-1402WLD ORDER ON MOTIONS FOR SUMMARY JUDGMENT RE FIRST AND THIRD CLAIMS

The City of Bellingham defendants have moved for summary judgment dismissing plaintiffs' first claim (alleging deprivation of due process of law, as guaranteed by the Fourteenth Amendment, in violation of 42 U.S.C. §1983) and third claim (alleging breach of contract). Plaintiffs have cross-moved for a determination that the cemetery management contract between the City and D&M Operating Company, a partnership, afforded them a property interest subject to due process protection. All materials filed have been considered; no party has requested oral argument, and none is necessary.

Summary judgment under Fed. R. Civ. P. 56 may be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. An issue of material fact is one that affects the outcome of the case and requires a trial to resolve differing versions of the truth. Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1305-06 (9th Cir. 1982). In deciding the motion the court views the evidence in the light most favorable to the non-moving party, and draws all reasonable inferences in that party's favor. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987). However, the non-moving party must respond to an adequately supported motion by showing that a genuine issue of material fact exists; if the response falls short of that, summary judgment should be granted. Fed. R. Civ. P. 56(e); T.W. Elec. Serv. Inc., 809 F.2d at 630-31.

When the foregoing test is applied here, there is no genuine issue of fact for trial as to the first claim. The cemetery management contract between the City and a partnership, even if plaintiff Dean DeBoer eventually became the sole remaining partner, did not afford a property right subject to due process protection. See San Bernardino Physicians' Services Medical Group, Inc. v. City of San Bernardino, 825 F.2d 1404 (9th Cir. 1987). No triable issue has been raised as to any alleged deprivation of a protected liberty interest. The procedural due process claim must be dismissed. The substantive due process claim must be dismissed for the same reasons, and also because no reasonable trier of fact could find that the defendants' conduct was irrational or unrelated to a legitimate governmental interest. See Halverson v. Skagit County, 42 F.3d 1257, 1261-63 (9th Cir. 1994).

As to the breach of contract claim, enough has been presented to raise genuine issues of material fact for trial.

For the reasons stated, the defendants' motion for summary judgment is granted as to the first claim, that claim is dismissed, and plaintiffs' cross-motion is denied. As to the third claim, defendants' motion is denied.

The clerk is directed to send copies of this order to all counsel of record.

Dated: July 23, 1996.

William L. Dwyer
United States District Judge

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEAN DEBOER and LUANNE DEBOER,

Plaintiffs-Appellants,

v.

CORRINE PENNINGTON; CAROL BROWDER; JANE DOE DOUGLAS; JANE DOE LITTLE; JANE DOE AYERS; JOHN DOE BJORNSON; JANE DOE HANNA, JANE DOE GISCHER; JANE DOE KNUTSON; JANE DOE HALL; JOHN DOE PENNINGTON; JOHN DOE BROWDER; JANE DOE ROWE,

Defendants-Appellees,

CITY OF BELLINGHAM; TIM DOUGLAS; LYNN CARPENTER; BRUCE DISEND; RICHARD LITTLE; BRUCE AYERS; LOUISE BJORNSON; ARNE HANNA; PAT ROWE; DON GISCHER; GENE KNUTSON; BOB HALL,

Defendants-Counter-Claimants-Appellees.

NO. 97-35363

DC No.
CV95-1402WLD

ORDER

BEFORE: CANBY and TASHIMA, Circuit Judges, and TAKASUGI, Senior District Judge.*

Judge Tashima votes to deny the petition for rehearing en banc and Judge Takasugi so recommends. Judge Canby recommends that the petition for rehearing en banc be granted.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. Fed. R. App. P. 35(b).

The petition for rehearing en banc is denied.

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* The Honorable Robert M. Takasugi, Senior United States District Judge for the Central District of California, sitting by designation.

APPENDIX D

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

U.S. Const. Amend. XIV, §1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.